SITUS OF CHOSES IN ACTION.

AT a dinner of the Boston Bar Association, some years since, a distinguished judge in his after dinner speech said to the lawyers present that the members of the bar must bear in mind that the court in deciding cases was governed by fixed rules and principles, and was not to be too severely criticised if its decisions were not always satisfactory. A distinguished member of the bar facetiously replied that he was glad to be assured that the court was governed by fixed rules and principles, as some of the recent opinions of the court had caused him to have some doubts upon the subject.

Professor Langdell, in his address before the Harvard Law School Association in 1886, speaking of what had been necessary to place the Law School on a proper footing, said: "It was indispensable to establish at least two things; first, that law is a science; secondly, that all the available materials of that science are contained in printed books." To say that law is a science is another way of saying that it is based upon rules and principles which can be ascertained and stated. When these rules and principles are the result of great wisdom, deep insight into human nature, and large experience of human affairs, or, in other words, when they approach closely to the principles of divine right and justice, courts and lawyers can start with them as safe premises, from which by established processes of reasoning they can reach safe conclusions.

It is the boast of the common law that it is based on rules and principles which we can with a considerable degree of safety carry out to their logical results and apply in the decision of new cases as they arise. It is also the boast of the common law that it has in it the element of growth, i. e. of adaptability.

As human life and human society grow more complex, the simple rule of an early day is oftentimes found to be too narrow, and judicial legislation is required in order to prevent an absurd result.

If courts are to be governed by fixed rules and principles, and are to reach satisfactory results, it is clear that two things are necessary; first, that the rules and principles be sound, and, second, that they be fully understood.

As we study the cases and read the opinions of many courts, we find not infrequently that courts have out of several rules or principles selected the wrong one for their guidance, or through ignorance have been governed by a supposed rule or principle instead of by a real one.

Of the many rules and principles of the common law none are more fundamental or wide reaching than those which relate to the *situs* of choses in action. While most of the law Latin and law French of the early common law writers has given place to modern English, no satisfactory substitute has yet been found for those odd sounding but all-meaning words *choses in action*. The following definition is taken from the "American and English Encyclopædia of Law," vol. 3, p. 235 : —

"A chose in action is a right of proceeding in a court of law to procure the payment of a sum of money. Promissory notes, bills of exchange, debts, policies of insurance, and annuities, are examples. . . . One view has restricted the term to rights of action for money arising under contracts; but while it comprehends these whatever the contract is, it is undoubtedly of much broader significance, and includes the right to recover pecuniary damages for a wrong inflicted either upon the person or property. It does not matter what the form of the action, legal or equitable, which is necessary to maintain the right."

It is apparent from this definition, that there is no other species of property with which courts and lawyers are called upon to deal so frequently as choses in action. Court calendars, dockets, and trial lists are chiefly composed of them. The enforcement of choses in action is, and always has been, the chief work of legal tribunals. It is manifestly important that all the rules and principles which relate to choses in action should be fully understood, as regards their origin, their scope, and their application. These rules relate not only to the *situs* or locality of choses in action, but also to the manner in which choses in action may be transferred, and how they may be legally discharged either with or without full satisfaction.

Inasmuch as the rules relating to their assignment and discharge are oftentimes made to depend upon the question of *situs* or locality, it seems desirable to consider, so far as we may in a single article, the rules and principles which especially relate to the *situs* or locality of choses in action.

The question of the locality of choses in action has presented itself in many different ways, and will undoubtedly present itself

in still other ways in the future. The question has come up most frequently, however, in the following classes of cases, viz.: (1) Cases relating to the administration of the estates of deceased persons; (2) Cases of gifts by will of personal property in a particular locality; (3) Cases of taxation; (4) Cases of foreign attachment, otherwise known as attachment by garnishee or trustee process; (5) Cases under State insolvent laws.

I shall consider each of these classes in the order named, with a view to ascertaining so far as may be what the principles are which govern in each.

ADMINISTRATION.

In Graybrook *v.* Fox, decided in 1561 in the Court of King's Bench,[1] we find it stated: "So that before the Statute of 31 Edward 3 (1357) the administrator . . . could not get in any debt nor sue any action, for his authority was confined only to the things in possession, and he could not meddle with things in action. . . . And by reason thereof the debtors of the intestate would keep the debts in their own hands, and the creditors of the intestate who ought to have them were disappointed of them."[2]

The appointment of administrators in England was by the Ordinary or Judge of the Ecclesiastical Court, having powers similar to those of a modern Judge of Probate. The jurisdiction of each Ordinary was confined to a particular diocese or district, and an administrator could bring suit only in the diocese where he was appointed.

An administrator could be appointed only in case there was personal property of a certain prescribed value located in the diocese. Property of the requisite value was called *bona notabilia.* After administrators were given power to sue for and collect debts and choses in action, the question must have soon arisen as to whether debts and other choses in action should be considered *bona notabilia,* and if so, where they should be considered as located for the purpose of giving jurisdiction to appoint an administrator.

In the case of Byron *v.* Byron, decided in the Court of King's Bench in 1596,[3] where the question was as to the proper place for the appointment of an administrator, the court say, "Every debt follows the person of the debtor." Where the debt is evidenced

[1] Reported in Plowd. 275, 278.

[2] See Holcomb *v.* Phelps, 16 Conn. 127, 134 (1844), for a fuller statement.

[3] 1 Croke's Reports, 472.

by a bond, "the debt is where the bond is, being upon a specialty; but debt upon a contract follows the person of the debtor, and this difference hath been oftentimes agreed."

The number of earlier cases cited shows that the question had ceased to be a new one.[1]

In the cases Pipon *v.* Pipon,[2] and Thorne *v.* Watkins,[3] both decided by Lord Hardwicke, Chancellor, it was held, in substance, that, while for the purposes of collection and the granting of administration debts have locality where the debtors reside, for purposes of distribution debts and other choses in action follow the law applicable to other personal property, viz. the law of the domicile of the deceased creditor. The reason given by Lord Hardwicke is, "that all debts follow the person, not of the debtor in respect of the right or property, but of the creditor to whom due."[4]

At a later date a statute was passed in England (55 Geo. 3, c. 184) imposing a probate duty on the property located in the jurisdiction where administration was granted. In a case which arose under this law,[5] the following statement or summary of the law then existing was given: "As to the locality of many descriptions of effects, household and movable goods for instance, there never could be any dispute; but to prevent conflicting jurisdictions between different ordinaries with respect to choses in action and titles to property, it was established as law that judgment debts were assets for the purposes of jurisdiction where the judgment is recorded, leases where the land lies, specialty debts where the instrument happens to be, and simple contract debts where the debtor resides at the time of the testator's death. . . . In truth, with respect to simple contract debts the only act of administration that could be performed by the ordinary would be to recover or to receive payment of the debt, and that would be done by him within whose jurisdiction the debtor happened to be." The court held that bonds of foreign governments which were marketable in England were assets located in England, on which probate duty was payable.[6]

The more recent English cases have been those involving a ques-

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[1] See Yeoman's Widow *v.* Bradshaw, Carthew, 373 (1697).

[2] 1 Ambler, 25 (1743).

[3] 2 Ves. Sen. 35 (1750).

[4] See 1 Saunders, 275, note (f).

[5] Attorney General *v.* Bouwens, 4 M. & W. 191 (1838).

[6] See also *Ex parte* Horne, 7 B. & C. 632 (1828); The Queen *v.* Trustee of Balby, &c. Road, 22 L. J. Q. B. 164 (1853); Gurney *v.* Sowden, 2 M. & W. 87 (1836).

tion of probate duty. Inasmuch as the test to be applied is the same as in the case of granting of administration, viz. in what place are choses in action to be deemed *bona notabilia*, we get some light from the recent decisions.

An Englishman died at Leicester, England. He was a creditor of the French government by reason of his holding a large amount of the securities known as *rentes*. It was held that the *rentes* were property located in a foreign country, and were not *bona notabilia* in England. Attorney General *v.* Dimond.[1] A large part of the estate of a deceased Englishman consisted of debts due from persons in North America. This part of his estate was held to be situate out of England. Attorney General *v.* Scope.[2]

In a very recent English case, Baroness Julia Stern *v.* The Queen,[3] it was held that shares of stock in certain American railroads were subject to probate duty in England. Stress was laid upon the fact that the certificates were negotiable, and would pass by delivery, and the shares were marketable in England.[4]

In marked contrast with the cases relating to probate duty are the cases under the English statute imposing a legacy duty. This duty is imposed upon all the personal property administered, without regard to its locality. A single case will show the rule which is followed. An English testator died possessed of considerable property in the American, Austrian, French, and Russian funds, which were transferable in those countries only. It was held to be subject to legacy duty, under the rule that personal property, wherever situate, follows the person of the owner, and is to be considered as situate at his domicile.[5]

In the United States the English rules relating to the *situs* of choses in action for purposes of granting administration have been followed to a considerable extent. As in England an administrator can sue only within the limits of the jurisdiction where he was appointed, so in the United States, as a general rule, an administrator can maintain an action only in the State or States in which

[1] 1 C. & J. 356 (1831).

[2] 1 C. M. & R. 530 (1834).

[3] 12 The Times L. R. 134 (1896).

[4] See also Attorney General *v.* Higgins, 2 H. & N. 339 (1857); Fernandes' Executors Case, L. R. 5 Ch. 314 (1870); Attorney General *v.* Pratt, L. R. 9 Ex. 140 (1874); Laidlay *v.* The Lord Advocate, 15 App. Cas. 468 (1890); Commissioners of Stamps *v.* Hope, [1891] App. Cas. 476; Attorney General *v.* Lord Sudeley, [1895] 2 Q B. 526.

[5] *In re* Ewin, 1 Cr. & Jerv. 151 (1830).

he obtained letters of appointment.[1] The following quotations from the text writers will serve as a summary.

In Hanson's "Probate, Legacy, and Succession Duties," [2] is this statement: "To prevent conflicting jurisdictions between different ordinaries with respect to choses in action and titles to property, it has been established at law that judgment debts are assets for the purposes of jurisdiction where the judgment is recorded; leases where the land lies; specialty debts where the instrument happens to be, — but in this respect the law has been altered, and specialty debts due from persons in the United Kingdom are now for the purposes of probate assimilated to simple contract debts by the 25 & 26 Vict. c. 22 (1862); and simple contract debts where the debtor resides at the time of the testator's death. . . . In truth, with regard to simple contract debts the only act of administration that could be performed by the ordinary would be to recover or to receive payment of the debt, and that would be done by him under whose jurisdiction the debtor happened to be. . . . If an instrument is created of a chattel nature capable of being transferred by acts done here and sold for money here, there is no reason why the ordinary or his appointee should not administer that species of property."

Professor Dicey, in his recent book on "The Conflict of Laws," uses the following language: "Whilst lands and generally though not invariably goods must be held situate at the place where they at a given moment actually lie, debts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced." [3]

[1] See Wyman *v.* Halstead, 109 U. S. 656 (1883); New Eng. Mut. Life Ins. Co. *v.* Woodworth, 111 U. S. 138 (1883); Equitable Life Ass. Soc. *v.* Vogel, 76 Ala. 441 (1884); Slocum *v.* Sanford, 2 Conn. 533 (1818); Holcomb *v.* Phelps, 16 Conn. 127, 134 (1844); Strong *v.* White, 19 Conn. 238, 248 (1848); Arnold *v.* Arnold, 62 Ga. 627, 637 (1879); Cooper *v.* Beers, 143 Ill. 25 (1892); Moore *v.* Jordan, 36 Kan. 271 (1887); Pinney *v.* McGregory, 102 Mass. 186 (1869); Merrill *v.* New Eng. Ins. Co., 103 Mass. 247 (1869); Speed *v.* Kelley, 59 Miss. 47 (1881); McCarty *v.* Hall, 13 Mo. 480 (1850); Becraft *v.* Lewis, 41 Mo. Ap. 546 (1890); Thompson *v.* Wilson, 2 N. H. 291 (1820); Chapman *v.* Fish, 6 Hill, 554 (1844); Beers *v.* Shannon, 73 N. Y. 292 (1878); Fox *v.* Carr, 16 Hun, 434 (1879); Hopper *v.* Hopper, 53 Hun, 394 (1889), 125 N. Y. 400 (1891); Matter of Romaine, 58 Hun, 109 (1890); Dial *v.* Gary, 14 S. C. 573 (1880); Vaughn *v.* Barret, 5 Vt. 333, 337 (1833).

[2] 3d ed. (1876), p. 159.

[3] See also Croswell on Executors and Administrators (1889), § 64; Story, Conflict of Laws, 8th ed., § 362.

While there has been very little attempt on the part of the judges and text writers at analysis or philosophical reasoning as regards the *situs* of choses in action for purposes of administration, we nevertheless can gather a few fundamental principles which either consciously or unconsciously have been made the basis of the rules adopted.

Administration as regards choses in action consists, first, of the collection of the same, and, second, of their distribution. Collection may be made in either of two ways. First, by a voluntary payment to the administrator by the several debtors; second, by suit brought by the administrator against debtors. In the case of certain kinds of choses in action, viz. bonds, stocks, and negotiable paper capable of being passed by delivery, the administrator may sometimes make distribution without reducing them to money, or may reduce them to money by means of sale. The power to enforce payment of choses in action by suit is without doubt the most essential part of an administrator's equipment. Before such power was conferred by Statute 31 Edward 3 (1357) debtors omitted to pay and administrators were helpless.

It is clear that choses in action can be collected by suit only in the jurisdiction where the debtor or his property can be reached. This ordinarily has been and will be the place where the debtor resides. It may, however, be any place where legal service of process can be made upon the debtor, or a legal attachment can be made of his property.

As one writer puts it, a chose in action must be considered as situate at the place where it can be effectively dealt with. It is useless to say that a chose in action follows the person of the creditor when the matter in hand is the enforcement of payment by a suit at law.

The rules adopted at an early day by the English court were evidently all based upon the principle that choses in action are to be considered as located in the place where they can be effectively dealt with, i. e. reduced to cash. Simple contract debts were held to follow the person of the debtor, and to be *bona notabilia* in the locality where the debtor lived at the decease of the intestate. As administration usually followed close upon the decease of the intestate, and debtors generally were permanent residents, administrators appointed at the places where the debtors resided at the time of the decease of the intestate apparently found no difficulty in bringing suits in the jurisdiction where they were appointed.

In the United States, with a population less fixed and with modern conveniences of travel, cases have arisen of debtors moving their residence after the death of their creditor before the appointment of any administrator. It has been held in such cases that the essential thing is to reach the debtor, and that the power to grant administration is not confined to the courts of the place where the debtor was living at the decease of the intestate, but extends to the courts of any State where he can be found and sued.[1]

I have found no satisfactory explanation of the distinction made in regard to judgments and debts by specialty. It seems likely that administrators were generally able to deal effectively with these classes of choses in action, either by sale or by suit within their own jurisdiction, or the distinctions must have become obsolete. The distinction between debts by simple contract and debts by specialty has been frequently disregarded in the United States, and has been to a considerable extent, if not wholly, done away with in England by Statute 25 & 26 Vict. c. 22. Where a specialty or other chose in action is of a negotiable character, and will pass by delivery, and can be collected or reduced to money without suit by a sale in the jurisdiction where the administrator is appointed, the modern tendency is clearly to give it locality in the place where it is found.

WILLS.

In marked contrast with rules established in the cases of administration are the rules which have been adopted in the case of gifts by will of personal property in a designated locality.

The cases are mostly English. In Popham *v.* Lady Aylesbury[2] there was a gift by will of a house with all that should be in it at testator's death. It was held that cash and bank notes in the house would pass, bank notes being the same as ready money; also that bonds and other securities in the house would not pass, they not being cash, but only evidence of so much money due. In Moore *v.* Moore[3] there was a gift by will of "all my goods and chattels in Suffolk." These words were held not to pass a bond found in testator's house in Suffolk. Lord Thurlow, Chancellor, said: "It is contended that this sort of credit has locality, because the law has made it *bona notabilia*. But it is doubtful whether the Court

[1] Saunders *v.* Weston, 74 Me. 85 (1882).

[2] Ambler, 68 (1748).

[3] 1 Bro. Ch. Cas. 127 (1781).

Christian having thought it sufficiently local for that purpose is enough to make it local as to this."[1]

In Massachusetts the law is the same.

In Penniman *v.* French,[2] promissory notes were held not to pass by a bequest of "indoor movables." The court said that choses in action have no locality. They appertain, not to the house, but to the person. In Theobald on Wills[3] is the following statement: "A bequest of chattels in a house will not pass choses in action such as bonds or securities for money in the house, which are considered not property in the house, but evidence of title to property elsewhere."

We find very little reasoning in any of the cases on this subject. A bald statement that choses in action have no locality seems to be considered sufficient. It is to be noticed that, where the locality named in the will was of sufficient extent to embrace the places of residence of the debtors who were liable upon the choses in action in question, the choses in action were held to be included in the gift. It seems probable, therefore, that the judges have had in mind the rule that debts have locality where the debtors live, rather than the rule that debts follow the person of the creditor.

The suggestion in one of the cases and in the text-book, that the choses in action are to be considered as evidence of title to property elsewhere, seems to refer to the property which the debtors are supposed to have in their hands ready to be applied in payment of their obligations.

TAXATION.

I shall refer to a few only of the cases, selecting those which illustrate the different rules which have been adopted relating to the *situs* of choses in action.

As a general rule, mere evidences of debt are regarded as intangible, and as having no location except in connection with their owner or his agents. In Illinois, Indiana, North Carolina, Vermont, and New York, it has been held that choses in action of a non-resident, when they are in the possession of or under the

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[1] See also Fleming *v.* Brook, 1 Sch. & Lefr. 318 (1804); Arnold *v.* Arnold, 2 Myl. & K. 365 (1835); Brooke *v.* Turner, 7 Sim. 671 (1836); Marquis of Hertford *v.* Lord Lowther, 7 Beav. 1 (1843); Guthrie *v.* Walrond, 22 Ch. D. 573 (1883); *In re* Prater, 37 Ch. D. 481 (1888).

[2] 17 Pick. 404 (1835).

[3] 4th ed. (1895), p. 165.

management of a managing agent who resides within the State, are taxable where the agent resides.[1]

In the case of the State Tax on Foreign-Held Bonds,[2] bonds of a Pennsylvania railroad corporation were held by non-residents. After the issuing of the bonds, the State of Pennsylvania passed a law requiring the treasurer of the railroad to retain five per cent of the interest on the bonds held by non-residents, and pay over the same to the State treasurer. The bonds in question were made out of the State and payable out of the State. They were secured by a mortgage on property in Pennsylvania. It was held by a majority of the court (four judges dissenting) that the tax was invalid, as being on property not in Pennsylvania, and being in effect an impairing of the obligation of the contract made with non-residents. The case is likened to that of a discharge in insolvency, which is held invalid as against non-residents.

In Murray *v.* Charleston,[3] it was held (two judges dissenting) that the city of Charleston could not levy a tax on its own bonds held by non-residents, although the general law authorizing such tax was in force when the bonds were issued. The particular ordinance laying the tax was not passed until after the bonds were issued.

In Kirtland *v.* Hotchkiss,[4] the court held that a citizen of Connecticut might be taxed for Western mortgage bonds held by him. "That debt, although a species of intangible property, may, for purposes of taxation if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond."

In United States *v.* Erie Railway Co.,[5] a tax laid by the United States on bonds issued by the Erie Railway Company, owned by Englishmen, was held good, the tax being collected through the company and paid by it to the United States. Field, J. dissented. Mr. Justice Bradley concurred with the majority in a separate opinion (p. 703), in which he says: "The objection that Congress had no power to tax non-resident aliens is met by the fact that the tax is not assessed against them personally, but against the *rem*, the *credit*, the *debt* due *to* them. Congress has the right to tax all property within the jurisdiction of the United States, with certain exceptions not necessary to be noted. In this case the money due to non-resident bondholders was in the United States — in the

[1] See 56 American Decisions, 527, note (1884).
[2] 15 Wall. 320 (1872).
[3] 96 U. S. 432 (1877).
[4] 100 U. S. 491 (1879).
[5] 106 U. S. 327 (1882).

hands of the company — before it could be transmitted to London or other place where the bondholders resided. Whilst here it was liable to taxation. Congress, by the internal revenue law by way of tax, stopped a part of the money before its transmission, viz. five per cent of it. Plausible grounds for levying such a tax might be assigned. It might be said that the creditor is protected by our laws in the enjoyment of the debt; that the whole machinery of our courts and the physical power of the government are placed at his disposal for its security and collection." [1]

In matters of taxation, the first question which must be asked is, Has the body which lays the tax power to collect it? That is to say, Is the property or its owner within the jurisdiction? Having decided that there is power to collect the tax, there remains the further question whether, as a matter of propriety or policy, it ought to be exacted. Where the owner of property is within the jurisdiction, it has never been doubted that power exists to collect from him taxes on all his personal property, whether within or without the State. It has become a common thing to tax residents for their choses in action, whether in the shape of accounts, notes, bonds, or stocks, even though the debtors or parties liable upon the obligations are non-residents. The reason commonly given has been that choses in action follow the person of the owner, and have locality where he resides.

Until the case of State Tax on Foreign-Held Bonds,[2] it was generally understood that the question was one of policy, and not of power, and that, if any State saw fit to tax choses in action belonging to non-residents, they could do so when the debtors were residents of the State. The State of Pennsylvania saw fit to pass a statute laying a tax on bonds held by non-residents and issued by corporations within the State. The legality of this statute came before the Supreme Court of Pennsylvania in the case of Maltby *v.* Reading, &c. R. R. Co.,[3] and the court upheld the statute.

Another case under a similar statute having been decided in the same manner in Pennsylvania, it was carried to the United States

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[1] See Goldgart *v.* The People, 106 Ill. 25 (1883); Dwight *v.* Mayor, &c. of Boston, 12 Allen, 316 (1866); State *v.* Darcy, 16 Atl. Rep. 160 (N. J., 1888); Worthington *v.* Sebastian, 25 Ohio St. 1 (1874); Sommers *v.* Boyd, Treas., 48 Ohio St. 648, 662 (1891); Maltby *v.* Reading, &c. R. R. Co., 52 Pa. St. 140 (1866); Catlin *v.* Hull, 21 Vt. 152 (1849); The State *v.* Gaylord, 73 Wis. 316 (1889).

[2] 15 Wall. 320 (1872).

[3] 52 Pa. St. 140 (1866).

Supreme Court, and that court, in 1872 (four judges dissenting), decided the Pennsylvania statute was unconstitutional. This was the case above mentioned of State Tax on Foreign-Held Bonds.

The language of the majority opinion was so vigorous that it has been often quoted as decisive of the whole matter. Field, J. said: "All the property there can be in the nature of things in debts of corporations belongs to the creditors, to whom they are payable, and follows their domicile wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement."

Strong as this statement is, it will hardly bear the test of careful analysis, or of comparison with the results reached by other tribunals.

It is sufficient answer to the suggestion that the State of Pennsylvania had no power to collect such a tax to call attention to the fact that the tax was already collected in the way provided, viz. by intercepting in the hands of the debtor within the State a portion of the interest money about to be sent to the non-resident bondholders. There can be no objection to the method employed. It is generally conceded that the best way of collecting a tax is by requiring the person who is to distribute any fund to take out the tax, and pay it over to the government. It is a common provision in the various collateral inheritance tax laws that the executor or administrator shall deduct and pay the amount of the tax before making distribution either to residents or non-residents. Judged by the rule that protection and taxation are reciprocal, there is surely no impropriety in a tax such as was laid by the State of Pennsylvania.[1]

It is evident that in any reasoning upon the question of the *situs* of choses in action we must start with the self-evident truth that, being incorporeal, they can have no actual *situs*. When we ascribe locality to them we do so in a figurative way, because it is impossible to deal with them without so doing. The fiction which gives them a *situs* where the debtor resides is certainly not an absurd one. In the usual case of a debtor and creditor, the debtor

[1] See Cooley on Taxation, 2d ed. (1886), p. 19.

has the tangible property which is to satisfy the debt, and the creditor has a hope more or less well grounded of receiving it. If the debtor lives in a State where laws are well enforced, the creditor by going there may reduce his hope to a certainty. If the debtor lives in a State where property is well protected, the creditor's expectation of getting his claim satisfied is the less likely to meet with disappointment.

Apart from its reasoning on the subject above cited, the basis of the decision of the United States Supreme Court in the case on Foreign-Held Bonds was the point that the statute was one which impaired the obligation of contracts made by the railroad with the non-resident bondholders. The authority for this position was found in the case of Baldwin *v.* Hale,[1] which decided that a discharge in insolvency, granted by a State court, was invalid as against non-resident creditors. In an article in this magazine, entitled "Discharge in Insolvency and its Effect on Non-residents,"[2] I ventured to question the soundness of Baldwin *v.* Hale. I desire to call attention to State Tax on Foreign-Held Bonds, and invite a similar inquiry.

If the tax is valid as against resident bondholders, why is it not valid against non-resident bondholders?

The United States Supreme Court can have nothing to say in regard to the propriety of such a tax. It is a question purely of the power of a State legally to collect it. That a State is able to collect such a tax, as well in the case of non-residents as in the case of residents, there can be no question.

The debtor is within the State, and the legislature and courts of the State have power over him to compel payment of the tax, and power to protect him against any claim his creditors may make by reason of such payment. If the non-resident creditor has property in the shape of a chose in action which is of any value, it is because he can rely on the legislature and courts of the State where his debtor resides to aid him in collecting his claim. In the case of State Tax on Foreign-Held Bonds, the statute which was held to impair the obligation of the contract was passed after the bonds were issued. In 1877, in the case of Murray *v.* Charleston,[3] the court applied the same rule, although the statute authorizing such taxation was in force when the bonds were issued.

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[1] 1 Wall. 223. [2] 6 HARVARD LAW REVIEW, 349. [3] 96 U. S. 432.

The city ordinance laying the tax was, to be sure, passed after the bonds were issued. Two judges dissented, on the ground that the law allowing such taxation, being in force before the contract was made, entered into it and became a part of it, and hence there was no impairment of the contract.

It is to be noticed that in Baldwin *v.* Hale the statute authorizing insolvency proceedings was enacted prior to the date of the contract which was held to be impaired.

In 1882 the United States Supreme Court, in the case above mentioned, of United States *v.* Erie Railway Company,[1] as it would seem, repudiated the reasoning which was the basis of the decision in State Tax on Foreign-Held Bonds. A tax laid by the United States on foreign-held bonds was held to be valid because the debt due to the foreigner was property within the jurisdiction of the United States. The court say, "The tax is not assessed against them [the foreigners] personally, but against the *rem*, the *credit*, the *debt* due to them." Mr. Justice Field, who wrote the opinion in State Tax on Foreign-Held Bonds, dissented. How much remains of the decision in that case seems to be a matter of some uncertainty. It is to be noticed, of course, that there is no constitutional provision forbidding the United States to pass laws impairing the obligation of contracts, so that the decision of United States *v.* Erie Railway Company does not overrule the previous decision.

Trustee Process.

The question of the *situs* of choses in action is directly involved in the cases of foreign attachment, or garnishee or trustee process, as they are commonly called. Attachment by trustee process is of very early origin, being derived, as it is said, from an early custom in London and Exeter. It is authorized by statutes in most, if not all, of the States. As the name foreign attachment indicates, it was permitted in early days only in the case of absent defendants, i. e. defendants who were out of the jurisdiction, or by reason of concealment were beyond the reach of process. This was the case in Massachusetts and Rhode Island until statutes were passed extending the law to resident as well as absent defendants. Goods as well as credits may be reached by trustee process. I shall confine my attention, however, to cases of attachment of credits or

[1] 106 U. S. 327.

choses in action belonging to absent defendants. It will be noticed that it is a fundamental feature of the proceeding in every case that a resident debtor is held to have discharged his debt by paying it, not to the creditor to whom it is due, but to some one else found by the court to have a valid claim against that creditor. We shall find that this discharge is without any legal service of process upon the creditor, and often without his knowledge. The whole framework of the structure, if we may so call it, rests upon the fiction that debts follow the person of the debtor, and have locality where the debtor resides, or where he can be legally served with process.

For a long time it was the rule in Massachusetts that a person could be held as trustee only in the State where he resided, and that he could not be held as trustee in any State where he might be temporarily found. The basis of the rule was the idea that the chose in action sought to be attached had its *situs* for purposes of attachment only at the residence of the debtor, and did not follow him away from that place.[1]

The same rule was applied to foreign corporations doing business in Massachusetts and it was held that they could not be there summoned as trustees.[2]

In 1870 the law in Massachusetts was changed by statute, and non-residents and foreign corporations having a usual place of business in the State were made liable to trustee process.

In the case of National Bank of Commerce *v.* Huntington,[3] the Massachusetts court not only decided that, under the Act of 1870, c. 194, a non-resident corporation having a usual place of business in Massachusetts was liable to trustee process, but also took occasion to say that there was no reason why a corporation should not be liable to trustee process in any State where it could be sued, that is to say, where it could be legally served with process.

Following this decision, it has been held in many other States that a corporation may be summoned as trustee in any State where it is doing business, and can be legally served with process not only where the principal defendant is a resident of the State, but also where he is a non-resident and served by publication only.[4]

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[1] Tingley *v.* Bateman, 10 Mass. 343 (1813); Nye *v.* Liscombe, 21 Pick. 263 (1838).

[2] Gold *v.* Housatonic Ry. Co., 1 Gray, 424 (1854); Larkin *v.* Wilson, 106 Mass. 120 (1870).

[3] 129 Mass. 444 (1880).

[4] Selma, Rome, & Dalton Ry. Co. *v.* Tison, 48 Ga. 351 (1873); Lancashire Ins.

Opposed to these decisions we find a series of cases in different States based on the doctrine that, while a debt or chose in action usually has its *situs* at the residence of the creditor, it may for purposes of attachment be given a *situs* at the residence of the debtor, but in no event can it follow the debtor away from his residence; and in the case of corporations it cannot follow them away from the State where they were organized.[1]

The courts in many States follow the early Massachusetts rule that an individual cannot be summoned as trustee where he is transiently found.[2] But the better rule would seem to be that, wherever the creditor can maintain a suit to recover his debt, there it may be attached as his property provided the laws of such place authorize it. As one of the judges puts it, the plaintiff in a trustee suit is subrogated to all the rights which the principal defendant has against the trustee. He stands in the shoes of the principal defendant.[3]

The fact that the debt due from the trustee is payable out of the State does not prevent its being reached.[4]

In a recent case in Wisconsin a justification for the attachment by trustee process of a debt due to a non-resident was found by referring to the law applicable in cases of administration of estates of deceased persons.[5]

Co. *v.* Corbett, 62 Ill. Ap. 236 (1895); Hannibal & St. Joseph Ry. Co. *v.* Crane, 102 Ill. 249 (1882); Wabash Ry. Co. *v.* Dougan, 142 Ill. 248 (1892); B. & M. Ry. Co. *v.* Thompson, 31 Kan. 180 (1884); Cousens *v.* Lovejoy, 81 Me. 467 (1889); National Bank *v.* Burch, 80 Mich. 242 (1890); Harvey *v.* Great Northern Ry. Co., 50 Minn. 405 (1892); McAllister *v.* Penn. Ins. Co., 28 Mo. 214 (1859); National Fire Ins. Co. *v.* Chambers, 53 N. J. Eq. 468 (1895); Railroad *v.* Peoples, 31 Ohio St. 537 (1877); Barr *v.* King, 96 Pa. St. 485 (1880); Moshassuck Felt Mill *v.* Blanding, 17 R. I. 297 (1891); Neufelder *v.* North British, &c. Ins. Co., 10 Wash. 393 (1894); Mooney *v.* Buford, &c. Co., 72 Fed. Rep. 32 (1896).

[1] Louisville & Nashville Ry. Co. *v.* Dooley, 78 Ala. 524 (1885); Ala. Great Southern Ry. Co. *v.* Chumley, 92 Ala. 317 (1890); McBee *v.* Purcell Nat. Bank, 37 S. W. Rep. 55 (1896, Ind. Ter.); Mo. Pac. Ry. Co. *v.* Sharitt, 43 Kan. 375 (1890); Douglass *v.* Ins. Co., 138 N. Y. 209 (1893); Blanc *v.* Tennessee, &c. Co., 37 N. Y. Supp. 906 (1896); Wood *v.* Furtrick, 40 N. Y. Supp. 687 (1896); Craig *v.* Gunn, 67 Vt. 92 (1894); Reimers *v.* Seatco Mfg. Co., 70 Fed. Rep. 573 (1895).

[2] Green *v.* Farmers' & Citizens' Bank, 25 Conn. 452 (1857); Cronin *v.* Foster, 13 R. I. 196 (1881); Baxter *v.* Vincent, 6 Vt. 614 (1834); Shinn on Attachment and Garnishment (1896), Vol. 2, sec. 490.

[3] Hardware & Mfg. Co. *v.* Lang, 127 Mo. 242 (1894); Howland *v.* Ry. Co., 36 S. W. Rep. 29 (1896, Mo.); Morgan *v.* Neville, 74 Pa. St. 52 (1873); Neufelder *v.* German American Ins. Co., 6 Wash. 336 (1893).

[4] Pomeroy *v.* Rand, McNally & Co., 157 Ill. 176 (1895).

[5] Bragg *v.* Gaynor, 85 Wis. 468 (1893).

In another recent case of trustee process in a United States Circuit Court of Appeals, an Administration decision was cited on the doctrine of *situs*.[1]

Shares of stock in a corporation belonging to a non-resident, if liable to trustee process at all, can be reached only in the State where the corporation was organized. They cannot be reached in any other State even though the corporation is doing business there and has an agent upon whom process can be served.[2]

The reason given is that shares for purposes of attachment have no *situs* except at the place of domicile of the corporation.

In a few cases the doctrine that a chose in action has its *situs* at the residence of the creditor and follows the creditor has been held fully applicable to cases of trustee process, and to prevent any valid attachment of debts due to a non-resident, except in cases of personal service on the principal defendant or of his voluntary appearance.[3]

We have cited only a few cases and authorities.

It is apparent that there has been a wide divergence of opinion on almost every point which has come up, and especially upon the point whether a debtor can be summoned as garnishee outside of the State of his residence. The tendency of legislation and of the decisions seems clearly to be that debts follow the person of the debtor, and that a person may be summoned as garnishee in any State where he can be legally served with process. In Massachusetts by statute a debtor may be summoned as trustee either where he lives or where he has a usual place of business; and in Massachusetts and many other States foreign corporations doing business in the State, and having a usual place of business or an agent upon whom service may be made, may be summoned as trustees or garnishees.

This is in effect saying that a debt may have more than one *situs* for purposes of foreign attachment.

It is another illustration of the rule that a debt may properly be treated as having locality in any place where it can be effectively dealt with, i. e. where it can be collected. If a man has a usual place of business in several States, and can be found in each and

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[1] Mooney *v.* Buford, &c. Co., 72 Fed. Rep. 32, 40 (1896).

[2] Plimpton *v.* Bigelow, 93 N. Y. 592 (1883); Ireland *v.* Globe Milling & Reduction Co., 32 Atl. Rep. 921 (1895, R. I.).

[3] Central Trust Co. *v* Chattanooga R. & C. Ry. Co., 68 Fed. Rep. 685 (1895); Reno on Non-Residents, Preface, p. vi.

served with process, it seems clear that there is no practical difficulty in the way of making him liable to trustee process in each State. The same is true of corporations doing business in several States.

In the case of Cross *v.* Brown in Rhode Island,[1] a strong argument was made by the claimant that it was unconstitutional for the court to undertake to discharge a trustee or garnishee from his obligation to a non-resident who was served by publication only.

The argument was briefly this. The United States Supreme Court have decided that State insolvent laws are unconstitutional in so far as they authorize the discharge of a debtor from his obligations to non-resident creditors who are served only by publication or notice out of the State.[2] The United States Supreme Court have also decided that State laws are unconstitutional which provide that resident debtors shall pay to the State in the shape of a tax a part of their debts, instead of paying them in full to the non-resident creditors.[3] Why does it not follow that State laws are unconstitutional which compel a resident debtor to pay the whole of his debt, not to his non-resident creditor, but to some third party, and which hold that such payment works a valid discharge of the debt, even though the non-resident creditor was served only by publication, and possibly never heard of the proceeding?

There is certainly much force in the argument. Similar reasoning was deemed conclusive by Judge Campbell, who wrote the dissenting opinion in the case of Moore *v.* Wayne Circuit Judge.[4] The chief ground of reply to this argument by the Rhode Island court was, that if it were adopted it would overturn the whole law of foreign attachment which had been in force for more than a century. This is another way of saying that the whole law of foreign attachment is against the cases of Baldwin *v.* Hale, and State Tax on Foreign-Held Bonds.

The true way to reach consistency, as it would seem, is to abandon Baldwin *v.* Hale, and State Tax on Foreign-Held Bonds.

State Insolvent Laws.

The question of the *situs* of choses in action arises in insolvency proceedings both in connection with the point as to what law shall

[1] 33 Atl. Rep. 147 (1895).
[2] Baldwin *v.* Hale, 1 Wall. 223.
[3] State Tax on Foreign-Held Bonds, 15 Wall. 320.
[4] 55 Mich. 84 (1884).

govern as to the debtor's discharge, and in connection with the point as to what law shall govern in determining what choses in action pass by the assignment.

The law on the latter point was considered by me in an article in this magazine, entitled "An Assignment in Insolvency and its Effect upon Property and Persons out of the State."[1]

The law on the first point was considered by me in the article previously mentioned, "A Discharge in Insolvency and its Effect on Non-Residents."[2] In this article,[3] I suggested that the relation of debtor and creditor was in a certain way one that entered into and formed a part of the status of the debtor and of the creditor, and that any court having a right or having the power to deal with the status of either could deal with this relation.

It may be further noticed that the relation of a debtor toward his creditor is in many ways similar to that of a trustee to his *cestui que trust*. The debtor, to be sure, does not hold any particular property for the benefit of the creditor. He holds all his property for the benefit of all his creditors, to the extent of their claims, and if he fails to recognize his obligations, and refuses to apply his property in satisfaction of his debts, the courts of law seize upon and apply it much in the same way that courts of equity take possession of trust property and make distribution of it.

In conclusion, one thing seems clear, viz. that the law relating to the *situs* of choses in action is in a state of confusion.

How can it be simplified? Mr. Justice Oliver Wendell Holmes, in his address at the last dinner of the Harvard Law School Association, June 25, 1895, said: "An ideal system of law should draw its postulates and its legislative justification from science. As it is now, we rely upon tradition, or vague sentiment, or the fact that we never thought of any other way of doing things as our only warrant for rules which we enforce with as much confidence as if they embodied revealed wisdom. . . . The Italians have begun to work upon the notion that the foundations of the law ought to be scientific, and if our civilization does not collapse I feel pretty sure that the regiment or division that follows us will carry that flag."

The law relating to the *situs* of choses in action, taken as a whole, is certainly not scientific. How shall we make it so?

Hollis R. Bailey.

[1] 7 HARVARD LAW REVIEW, 281.

[2] 6 HARVARD LAW REVIEW, 349.

[3] Page 359.